# BOOK REVIEWS.

JURISPRUDENCE, LAW AND ETHICS. By EDGAR B. KINKEAD, New York: The Banks Law Publishing Company. 1905. pp. vii, 381.

Professor Kinkead feels, as do many other modern writers, that the sharp distinction drawn by the analytical jurists between positive law and morality is injurious to the law. He is moved to insist upon the facts that the law is largely applied morality, and that, when new legal rules are needed, judges as well as legislators commonly find them in the morals of their country and their age.

If the author had confined himself to the development of these propositions, he would have been invulnerable to criticism. He has, however, gone much further. In accordance with the theory of the extremists in the natural-law school (which he calls the "metaphysical" school and rather singularly identifies with the "philosophical" school of Thibaut) he holds that right is law before it is recognized as such by judges or legislators; and he seems to hold that judicial decisions or legislative acts which embody unrighteous rules do not make such rules legal. This second proposition is not expressly advanced, but it necessarily follows, at least as regards American law, from his assertion that "adherence to morality on the part of legislators and judges is mandatory in America" under the provisions of our constitutions (preface, p. iv).

This latter assertion he endeavors to prove (pp. 144–147) by citing eleven state constitutions and one dictum of a New York judge. The proof does not seem conclusive. The dictum is to the effect that "Sound morality is the cornerstone of the social edifice—whatever disturbs that is condemned under the fundamental rule." The constitutional provisions cited are general statements that intelligence and morality are essential to free government and to the preservation of the rights and liberties of citizens, followed in most cases by mandates that public schools shall be maintained and that public worship shall be protected. The Massachusetts constitution, which in the opinion of the author goes further than the constitutions of other states, declares that "a constant adherence to [the principles] of piety, justice, moderation, temperance, industry and frugality [is] absolutely necessary to preserve a free government;" and the conclusions drawn from these premises are that the people ought to be very careful in choosing their representatives, and that "they have a right to require of their law-givers and magistrates an exact and constant observance of the laws necessary for the administration of the commonwealth." If the word "morals" had been used in this last clause instead of the word "laws" it would have come nearer to sustaining the author's contention. If the moral yearnings which Americans are in the habit of inserting in their state constitutions are

to be regarded as fundamental law, it is obvious that the grounds on which statutes may be attacked as unconstitutional are broader and more numerous than has heretofore been supposed.

It is rather odd that our author does not perceive the necessarily anarchical tendency of his contentions. He indeed assumes all along that there is an absolutely definite standard of morals, but his own standard appears to be his individual conscience rather than general opinion. Otherwise it is difficult to account for his unhesitating statement (pp. 257, 263) that the licensing of the sale of alcoholic liquors is immoral, or for his apparently equally firm conviction that a high customs tariff is perfectly defensible (p. 237).

Professor Kinkead does not seem to regard all law as applied morality, for he cites without dissent passages from writers of the analytical school in which attention is called to the fact that many rules of the law deal with questions to which morality gives no answer. In so far, however, as the questions which the law has to answer have a moral aspect, he is unwilling to admit that law and morals can be at variance. He takes great pains to explain away the seeming conflicts which arise when the law permits an obligation to be avoided by reason of lack of consideration or under the rules of the statutes of frauds or the statutes of limitation. His defense of these legal rules on the ground of overpowering social interest can not be satisfactory to himself, for he rejects the theory that morals rest on social expediency; and he practically abandons the attempt to reconcile law with morality in this class of cases when he says that a conscientious lawyer should not advise his client to plead limitation, but should simply "advise the client as to his rights and let him do as he chooses." (pp. 261–263, 278, 281 et seq.).

If the author is not sure that all law is included in morals, he is on the other hand quite surprisingly confident that all morality is included in the law. "The state in this enlightened twentieth century has fulfilled its divine mission by passing *all* the necessary laws to safeguard and inculcate Christian morality." (p. 225). "Our courts are in duty bound and stand ready to remedy *all* invasions upon morality" (ibid.) (The italics are the reviewer's.) Of course this is not true, and it would be pity were it true. In those periods of the world's history in which such statements as the above were substantially true—in the European middle ages, when the ecclesiastical courts undertook to punish all immorality and the civil authority put the sanction of physical force behind the ecclesiastical judgments; and again in the English commonwealth and in the Puritan colonies of New England, when the same experiment was tried on a smaller scale and for a shorter period—the results were advantageous neither to law nor to morals. We commonly pride ourselves to-day on the modern discovery (or re-discovery) that in many matters of great social concern the purely psychical sanctions of social opinion are more effective than the physical sanctions of law. If the identification of morals with law does not lead us back to the canon law or to the "blue laws," it must logically lead to an equally disastrous result—the substitution of the legal for the moral standard of conduct. In one passage the author does not seem to have escaped this peril, for he says that "if we did not have any law punishing murder, arson, per-

jury and the like, we would not have any standard of morality to set before the people" (p. 257). It is hardly probable that the author really believes what he here asserts; but it is not easy to determine what he really believes.

For the historical school of jurisprudence Professor Kinkead indicates great respect, apparently because he is aware that the development of this school in England and in America has resulted in a reaction against the extreme analytical position. He is, however, apparently unaware that the historical school represents an equally strong reaction against the natural-law school, to which, on the whole, he clearly belongs. In deference to the claims of the historical method he undertakes to interweave some legal history with his jurisprudence. Much of the little he gives us, however, is not history at all, but pure misapprehension. Many of the statements which he makes about the development of the Roman law are so extraordinary that it is difficult to conjecture upon what authority he has imagined that he was relying. He tells us, for example, that law was made at Rome, in part, at least, "by the decisions * * * of the * * * *judices*" (p. 83); which is very much as if one should say that law was made in England by the verdicts of juries. He asserts, again, that the *praetor peregrinus* was "appointed for the outlying provinces" (ibid.), and that this magistrate "was stationed at Rome, but went into the conquered states whenever it was necessary to the performance of his duties" (p. 90); which is very much as if one should assert that the High Court of Admiralty used to sail a circuit including all the British colonies. In his occasional excursions into mediæval European law he is equally unfortunate. He confuses the Gothic code of the seventh century, made in Spain, with the Theodosian code of the fifth century made at Constantinople (p. 94). He tells us that "the custom of enacting territorial statutes originated with the kings of Italy" (p. 110)—apparently meaning, in view of the context, that the publication of dooms by the Saxon kings rested on some Italian model. The earliest royal laws in England were those of Aethelbirht, 560–616, and these, like all old German laws, were tribal rather than territorial. But who were the antecedent "kings of Italy?" Is the reference to the kings of the East Goths? and was it the Edict of Theodoric which served as a model for Aethelbirht's Kentish dooms? Again, our author alludes to Bologna as "the oldest school of law" (p. 127), although it was not the oldest even in mediæval Italy. Even in his English legal history, and with the guidance of Pollock and Maitland, he walks uncertainly. He says that the Anglo-Saxon courts did not follow precedents (p. 112), being apparently unaware that doom means judgment and that the Anglo-Saxon laws, like the continental German tribal laws, were essentially collections of judgments. He tells us that the promulgation of laws by English kings began with Alfred in the ninth century (p. 110), ignoring the Kentish legislation of the sixth and seventh centuries and the West-Saxon laws of Ine at the beginning of the eighth century. He speaks of the laws of Edward the Confessor as if the compilation that has come down to us, which is a private compilation made in the twelfth century, had really emanated from that ruler (pp. 109–111).

We have already noted some haziness as regards the various modern

schools of jurisprudence; but it should be added that Professor Kinkead is evidently unaware that Hobbes was the intellectual ancestor of the analytical school; and that he most unjustly classes Sir Frederick Pollock among the extreme adherents of that school (p. 267).

Of the last part of the book, the chapters on "Legal Ethics" (pp. 307–357), it is pleasant to be able to speak with hearty commendation. Here right feeling is the main thing, not critical analysis; and here, as in the rest of the book, the author's instincts are thoroughly sound.

THE ELEMENTS OF JURISPRUDENCE. BY THOMAS ERSKINE HOLLAND. Tenth Edition. New York: Oxford University Press, American Branch. 1906. pp. xxv–443.

The first edition of Professor Holland's Jurisprudence appeared in 1880; since then it has undergone successive reprints and revisions to the number of ten. Of the last the distinguished author advises us that "he has now carefully revised the work, adding much new matter, suggested in more than usual abundance, by recent decisions and discussions." So successfully has this been done that little of value has been omitted; and little that has become obsolete has been retained, thus avoiding the necessity of making the volume too cumbrous.

To say this work has been epoch-making in the field of legal science is but repeating a platitude to those who are familiar with it, but not only has Professor Holland inaugurated a new epoch in that, as Sir Frederick Pollock has declared, it is "the first work of pure scientific jurisprudence which has appeared in England—that is, of the general science of law distinctly separated from the ethical part of politics," but also from the beginning he has set a standard, of which each successive edition marks a step in advance that we may not hope to see soon rivaled.

Whether or not we accept Professor Holland's analysis of law, as being for jurisprudence, only those general rules for the guidance of external human action enforced by a sovereign political society, we must admire the clearness and precision with which he eliminates all that he considers unessential; whether or not we accept his classification of rights as the most satisfactory basis for a general consideration of the law, we must admit the almost compelling force of the logic of its elaboration, and in the end feel constrained to congratulate the legal world upon the possession of such a treatise and the author upon having done so great a service to the science of the law.

Too much can scarcely be said in its praise, either as to content or as to form; as regards the former, however, it may be said from the standpoint of an American user, that, despite the many references to American law and to decisions of state and federal courts, the wish often arises that a real American edition might be issued by the author himself or by some competent American jurist in which the weight of authorities cited and points of detail settled might be American, not English—such an edition would have the sole advantage of being more practical and useful to the American student. The form of the book is admirable in all its details, embracing a table of cases and a very complete index. It would be unnecessary to attempt an outline of the general method of treatment,